PP

v.

NAGALINGAM S FATHINATHAN

HIGH COURT MALAYA, SHAH ALAM
SU GEOK YIAM J
[CRIMINAL CASE NO: 45-90-2004]
6 MARCH 2009

CRIMINAL LAW: *Penal Code - Section 304 - Culpable homicide not amounting to murder - Sentence - Factors considered - Public interest - Gravity of type of offence committed - Plea of guilty - Whether a mitigating factor - Whether accused entitled to discount or credit for having pleaded guilty*

The accused was charged with the amended charge for the offence of culpable homicide not amounting to murder under the first limb of s. 304 of the Penal Code which provides for a mandatory imprisonment term not exceeding 20 years and liable to be fined. On the facts, the accused together with several others had broken into a factory. The deceased was an employer of the said factory. The accused and his friends then woke up the deceased and the other occupants of the said factory. In the process the deceased attempted to run away but the accused and his friends chased after the deceased. The accused then slashed the deceased on the neck with a long parang and the deceased fell onto the ground bleeding. The deceased subsequently passed away. The cause of the deceased's death was the slash wound on the neck; that the deceased probably might have lost a lot of blood from the wound on the neck and that the object which caused the injury on the neck was a sharp object such as a parang or heavy knife. The accused pleaded guilty and the court convicted the accused as per the amended charge. Before passing sentence the court considered the accused's plea in mitigation. The court sentenced the accused to thirteen years imprisonment from the date of his arrest. The accused was dissatisfied with the said sentence imposed on him by the court.

Held:

(1) It is trite law that the first and most important factor which the court must take into consideration before imposing any sentence is the public interest and the protection of society.

A Public interest is best served if the offender is induced to turn away from criminal ways. The correct approach for the court to take is to strike a balance as far as possible between the interests of the public and the interests of the accused. The court took judicial notice of the increasing number of crimes
B of violence involving the breaking into occupied buildings and premises and the killing of the occupants as news of such happenings are constantly being reported in the newspapers. Public interest and the protection of the society require that an appropriate sentence be passed so as to deter not only the
C accused from repeating his crime but also to deter other would be offenders who, like the accused in this case might be tempted to try crime as seeming to offer easy money on the supposition that if they were caught they would only suffer a light sentence and to punish the accused who is the
D perpetrator of the crime in the light of the particular facts and circumstances of each case. (paras 23, 27 & 28)

(2) The facts of the case showed that the deceased was killed in the safety and security of his employer's factory by the
E accused who together with several others had broken into the factory while armed with dangerous weapons *ie*, parang, rotan, iron rod and hoe. It must also be considered the serious nature of the injuries which were inflicted on the deceased by the accused using a long parang. These injuries were set out
F in the postmortem report which have been reproduced. The postmortem report and the gory photographs bear testimony to the seriousness of the injuries which were inflicted on the deceased by the accused. The accused in the instant case had acted in a vicious manner without any provocation on the
G part of the deceased who was merely attempting to run away from the accused and his friends. The accused had chosen to savagely attack and kill the defenceless deceased. (paras 29, 30, 31 & 37)

H **(3)** The accused had pleaded guilty at the first available opportunity, therefore the court accepted his guilty plea as a mitigating factor which should carry some weight. The accused was entitled to a discount or credit for having pleaded guilty to the reduced charge. This plea of guilty must be set off
I against the seriousness of the crime which the accused had committed because it had saved much public expense and also the valuable time of the court which could be utilized to dispose off other criminal cases. (para 38)

(4) The credit or discount given was on the sentence that the court would have imposed on the accused after a trial if the accused had not pleaded guilty and not on the maximum sentence as provided for in s. 304(a) of the Penal Code. If the accused had claimed trial to the reduced charge the court would have imposed on the accused the maximum sentence of 20 years imprisonment. However, in view of the accused's plea of guilty, the court have given him a discount of about a third of that sentence, and accordingly, sentenced the accused to a term of thirteen years imprisonment from the date of his arrest. (para 39)

[Order accordingly.]

Case(s) referred to:
Christopher Khoo Ewe Chong v. PP [1998] 3 CLJ 705 CA ***(dist)***
Mohamad Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 ***(refd)***
PP v. Muthu Subramaniam Seeniservai [2001] 7 CLJ 236 HC ***(dist)***
PP v. Teh Ah Cheng [1976] 1 LNS 116 ***(refd)***
R v. Boyd [1980] 2 Cr App R (S) 244 ***(refd)***
Rex v. Kenneth John Ball 35 Cr App R 164 ***(refd)***
Sau Soo Kim v. PP [1975] 1 LNS 158 ***(refd)***

Legislation referred to:
Penal Code, ss. 302, 304(a)

For the accused - Rajpal Singh; M/s Rajpal & Assoc
For the prosecution - Siti Rafidah Zainuddin DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Su Geok Yiam J:

[1] The accused was originally charged for an offence of murder under s. 302 of the Penal Code which carries only one sentence which is a mandatory death penalty. He was first produced in the High Court at Shah Alam on 17 January 2005.

Original Charge

[2] The original charge, P1, states as follows:

A Bahawa kamu, pada 27/04/2003, pada jam antara 3.15 pagi hingga 3.30 pagi, di sebuah kilang Yuen Hiong Trading yang beralamat di Lot 8604, Batu 5, Jalan Langat, di dalam daerah Klang, di dalam Negeri Selangor, telah melakukan bunuh dengan menyebabkan kematian terhadap seorang lelaki bernama Ngima
B Tamang (Passport No: 1390404). Oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[3] Fortunately, for him, however, on 4 December 2008, Puan Siti Rafidah bt. Zainuddin, the learned Deputy Public Prosecutor
C (DPP), informed the court that the representation which was made by the accused's learned counsel to the Attorney General's Chambers at Putrajaya had been accepted by the latter. She, accordingly, tendered on behalf of the Public Prosecutor an amended charge, P3, against the accused for the offence of
D culpable homicide not amounting to murder under the first limb of s. 304 of the Penal Code. The section provides for a mandatory imprisonment term not exceeding 20 years and the accused is also liable to be fined.

E **Amended Charge**

[4] The amended charge, P3, states as follows:

Bahawa kamu pada 27 April 2003, jam antara 3.15 pagi hingga 3.30 pagi, di sebuah kilang Yuen Hiong Trading yang beralamat
F di Lot 8604, Batu 5, Jalan Langat, di dalam daerah Klang, dalam Negeri Selangor Darul Ehsan, dengan niat menyebabkan kematian Ngima Tamang (Passport No: 1390404), dan dengan itu kamu telah melakukan homisid salah yang tidak terjumlah kepada kesalahan membunuh yang boleh dihukum di bawah seksyen 304(a) Kanun Keseksaan.
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[5] The amended charge, P3, was read and explained to the accused. The accused pleaded guilty to the amended charge. The court having satisfied itself that the accused understood the nature and the consequences of pleading guilty to the amended charge
H accepted the accused's plea of guilty.

[6] As the learned DPP was not ready to tender the facts of the case and the exhibits on that day, the court adjourned the case to 7 January 2009 for sentencing.

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[7] On 7 January 2009 after the written facts relating to the commission of the offence, P4, were read out and explained to him, the accused admitted them as true. He also admitted the exhibits which were tendered by the learned DPP, namely, one police report, ie, Klang Report No. 15601/03, P5, the postmortem report No. 242/03 dated 22 July 2003, P6, a number of coloured photographs, P7, a pair of trousers belonging to Ngima Tamang ("the deceased"), P8 and a shirt belonging to the deceased, P10.

[8] In this case the murder weapon was not recovered.

[9] The court convicted the accused as per the amended charge. Before passing sentence the court considered the accused's plea in mitigation made on his behalf by his learned counsel, Mr. Rajpal Singh, and the submissions of the learned DPP. The court sentenced the accused to 13 (thirteen) years imprisonment from the date of his arrest on 24 March 2004 ("the said sentence").

[10] The accused is dissatisfied with the said sentence imposed on him by the court and has filed a notice of appeal to the Court of Appeal.

[11] Below are the reasons why the court passed the said sentence on the accused:

[12] The facts of the case are, briefly, as follows:

[13] On 27 April 2003 at about 3.15am in the morning the accused together with several others broke into the factory of Yuen Hiong Trading at Lot 8604 Batu 5, Jalan Langat Klang, Selangor. They were armed with parang, rotan, iron rod and hoe. At that time the deceased who was a young Nepalese man aged 23 (twenty three) years old, his employer and his employer's wife and children and the other employees at the factory were asleep.

[14] The accused and his friends then woke up the deceased, his employer and his employer's family and the other employees of the factory and tied them up. In the process the deceased attempted to run away but the accused and his friends chased after the deceased. The accused then slashed the deceased on the neck with a long parang. The deceased fell on to the ground bleeding.

[15] The accused and his friends then made their getaway on their motorcycles.

[16] The deceased subsequently passed away.

[17] At about 4.30am the same morning, the police received a telephone call from a man who identified himself as Mr. Lee informing them of the incident. This became the first information report ie, Klang Report No. 15601/03.

[18] On 24 March 2004, the accused was arrested by the police.

[19] Dr. Khairul Azman bin Hj. Ibrahim, the Consultant Forensic Pathologist in his post mortem report, P6, states that the deceased suffered the following injuries:

> 1) Slashed wound on left side of neck, horizontal position, elliptical shape, 10.5 cm below left ear measuring 8 x 4 cm. The front end showed tailing abrasion measuring 2.3 cm and the posterior end measured 1 cm. The left lateral half of the cervical vertebra (C6) was cut. The neck muscle on the left side of neck were also cut. The vertebral artery was also cut. The left jugular and left carotid were normal as were those on the right side.
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> 2) Slashed wound over medial aspect of right knee vertical position, elliptical shaped measuring 7.5 x 2.5 cm. The medial part of knee capsule was cut and medial head of right tibia was also cut.

[20] He was of the view that the cause of the deceased's death was the slash wound on the neck, that the deceased probably might have lost a lot of blood from the wound on the neck and that the object which caused the injury on the neck was a sharp object such as a parang or heavy knife.

[21] The accused was aged 21 (twenty one) years and 2 (two) months old at the time of the commission of the offence. He is the eldest of 5 (five) siblings. He was married at the time of his arrest. His wife is 3 (three) months pregnant. While he was under remand for this offence his father passed away in the year 2006. The accused is a first time offender. He has no previous convictions. He is remorseful over the incident which he had committed while under the influence of his friends.

[22] The learned DPP has confirmed that the accused is a first offender.

[23] It is trite law that the first and most important factor which the court must take into consideration before imposing any sentence is the public interest and the protection of society. Public interest is best served if the offender is induced to turn away from criminal ways.

[24] In the well known and off quoted case *Rex v. Kenneth John Ball* 35 Cr. App. R 164 the learned judge said as follows:

> In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to trun from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard of each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

[25] In another off quoted case *Public Prosecutor v. Loo Choon Fatt* [1976] 1 LNS 102 the learned judge said as follows:

> One of the main considerations in the assessment of sentence is of course the question of public interest.

[26] And in *Public Prosecutor v. Teh Ah Cheng* [1976] 1 LNS 116, the well known judge, the late Eusoffe Abdoolcader, J said as follows:

> In sentencing generally the public interest must necessarily be one of the prime consideration … public interest should never be relegated to the background and must of necessity assume the foremost importance.

[27] The correct approach for the court to take is to strike a balance as far as possible between the interests of the public and the interests of the accused.

[28] The court took judicial notice of the increasing number of crimes of violence involving the breaking into occupied buildings and premises and the killing of the occupants as news of such happenings are constantly being reported in the newspapers. Public interest and the protection of the society require that an appropriate sentence be passed so as to deter not only the accused from repeating his crime but also to deter other would be offenders who, like the accused in this case might be tempted to try crime as seeming to offer easy money on the supposition, that if they are caught they will only suffer a light sentence and to punish the accused who is the perpetrator of the crime in the light of the particular facts and circumstances of each case.

[29] Secondly, the facts of the case show that the deceased was killed in the safety and security of his employer's factory by the accused who together with several others had broken into the factory while armed with dangerous weapons ie, parang, rotan, iron rod and hoe.

[30] Thirdly, the court considered the serious nature of the injuries which were inflicted on the deceased by the accused using a long parang. These injuries which were set out in the postmortem report have been reproduced in the earlier part of this judgment.

[31] The postmortem report and the gory photographs bear testimony to the seriousness of the injuries which were inflicted on the deceased by the accused.

[32] The two cases of *PP v. Muthu Subramaniam Seeniservai* [2001] 7 CLJ 236 and *Christopher Khoo Ewe Chong v. PP* [1998] 3 CLJ 705 which were cited by the learned defence counsel and the learned DPP to support their respective contentions, with respect, are distinguishable on their facts.

[33] The reasons are because in the first case, although the deceased had suffered a single injury to his neck which proved fatal the trial had commenced and the prosecution had called 12 (twelve) witnesses including the doctor who had conducted the

postmortem on the deceased to testify against the accused before the prosecution reduced the charge whereupon the accused pleaded guilty. During the trial when he was cross-examined by the defence the doctor conceded that the single stab wound on the left side of the deceased's neck which is 7.7 cm deep and reaching the bone and which caused the death of the deceased could have been inflicted by the accused on the deceased when the deceased was attempting to defend himself or when the deceased was attempting to stab others.

[34] As a result of this damaging evidence the prosecution reduced the charge from one of murder to one of culpable homocide not amounting to murder under the second limb of s. 304 of the Penal Code which is only punishable with imprisonment for a term which may extend to ten years, or with fine, or with both. The accused had pleaded guilty immediately although the accused had a good defence to the reduced charge ie, the right of self-defence. It was also stated in the facts of that case which was tendered by the prosecution that the accused had stabbed the deceased during a struggle. Furthermore, according to the accused the deceased had hit the bonnet of his car causing the accused to get out from his car. A quarrel ensued between the accused and the deceased which led to a struggle between the two of them. It was during the struggle that the accused alleged that he stabbed the deceased in self-defence.

[35] In the second case the facts show that the gruesome killing of the deceased was entirely senseless and unnecessary.

[36] In the opinion of the court the accused in the instant case has acted in a vicious manner without any provocation on the part of the deceased who was merely attempting to run away from the accused and his friends. The deceased who was only two years older than the accused had come all the way from his homeland, Nepal, to work here. On the other hand the accused who was a normal and healthy man had chosen to savagely attack and kill the defenceless deceased.

[37] Fourthly, the court was of the view that although the accused was a first offender this fact was not a sufficient mitigating factor because the offence which he has committed is such a grave offence.

[38] Fifthly, the court considered favourably the accused's plea of guilty. The reason is because the accused has pleaded guilty at the first available opportunity. The court, therefore, accepted his guilty plea as a mitigating factor which should carry some weight. (See *Sau Soo Kim v. PP* [1975] 1 LNS 158). The court was of the view that the accused was entitled to a discount or credit for having pleaded guilty to the reduced charge. This plea of guilty must be set off against the seriousness of the crime which the accused has committed because it has saved much public expense and also the valuable time of the court which can be utilised to dispose off other criminal cases.

[39] The credit or discount given is on the sentence that the court would have imposed on the accused after a trial if the accused had not pleaded guilty and not on the maximum sentence as provided for in s. 304(a) of the Penal Code. (See *R v. Boyd* [1980] 2 Cr App R (S) 244 and *Mohamad Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209). In this case if the accused had claimed trial to the reduced charge the court would have imposed on the accused the maximum sentence of 20 (twenty) years imprisonment. However, in view of the accused's plea of guilty the court gave him a discount of about a third of that sentence and, accordingly, sentenced the accused to a term of 13 (thirteen) years imprisonment from the date of his arrest.